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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT TACOMA

10 H. STANLEY GASS et al.,

11                   Plaintiffs,

12                   v.

13 ALBERT F SCHLOTFELDT, et al.,

14                   Defendants.

15                   No. C05 5602RBL

16                   ORDER ON MOTIONS  
17                   FOR SUMMARY  
18                   JUDGMENT

19                   This matter is before the court on the following Motions<sup>1</sup>: Plaintiff Gass' Motion for Judgment on  
20 the Pleadings [Dkt. #20] and Defendants' Motion for Summary Judgment [Dkt. #21].

21                   The underlying case has its roots in a state court proceeding involving Mr. Gass on the one hand  
22 and an entity called Olson Engineering on the other. The defendants here represented Olson, Mr. Gass'  
23 adversaries, in the underlying state court litigation. In that case, Olson sought payment for work done for  
24 Mr. Gass, and commenced a litigation against him for breach of contract. Olson, through its attorneys,  
25 claimed in the underlying action that it could not locate Mr. Gass and proceeded to serve him by mail. A  
26 default judgment in the amount of approximately \$63,000 was taken.

27                   When he learned of the judgment, Gass sought to have it vacated, alleging among other things that  
28 Olson's attorneys (the defendants in this case) had engaged in fraud, misrepresentation, violations of Rule  
11, and the like. The bulk of his claim was that the attorneys had lied in obtaining the default judgment

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<sup>1</sup>Plaintiff has also moved for a "pretrial conference" or status conference [Dkt. #13], which, given the resolution of the remaining motions, is not warranted. That Motion is therefore DENIED.

1 when they told the Court that Mr. Gass could not be located in Washington state.

2 Judge John Nichols of the Clark County Superior Court heard and rejected these allegations, but  
 3 nevertheless vacated the default judgment. At the same time, he ordered Gass to pay Olson \$1000 in  
 4 terms and he permitted Olson to “attach” the property at issue prior to judgment. Gass subsequently  
 5 sought to sell the property (receiving a \$1000 “discount” in the form of being permitted to apply the  
 6 sanction to the claimed amount) and voluntarily settled with Olson, in order to convey clean title to his  
 7 purchaser. The underlying state court action was therefore dismissed.

8 Gass now sues Olson’s attorneys here, accusing them, in addition to the transgressions he claimed  
 9 in state court, of mail fraud and asserting a RICO claim. He also claims that they made “threats” against  
 10 him in order to force him to settle the underlying litigation.

11 Mr. Gass has moved for Judgment on the Pleadings. He argues that “nothing in the Defendant’s  
 12 Answer provides defenses sufficient to [survive the Plaintiff’s Motion for Judgment on the Pleadings.]”  
 13 This of course is a legal conclusion, and the Plaintiff’s Motion cites no authority for the legal proposition.  
 14 Instead, the Answer denies the factual allegations contained in the Complaint, and sets up the affirmative  
 15 legal defenses which are the subject of Defendants’ Motion, discussed below.

16 Defendants seek Summary Judgment on Plaintiffs’ claims against them, arguing that Gass cannot  
 17 establish the required elements of a civil RICO claim, including a predicate act; that he has not suffered any  
 18 damages (also an essential element a RICO claim); and that even the elements were established, the  
 19 conduct about which Gass complains is privileged.

20 **A. Summary Judgment Standard.**

21 Summary judgment is appropriate when, viewing the facts in the light most favorable to the  
 22 nonmoving party, there is no genuine issue of material fact which would preclude summary judgment as a  
 23 matter of law. Once the moving party has satisfied its burden, it is entitled to summary judgment if the  
 24 non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on  
 25 file, “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317,  
 26 324 (1986). “The mere existence of a scintilla of evidence in support of the non-moving party’s position is  
 27 not sufficient.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9<sup>th</sup> Cir. 1995). Factual  
 28 disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a  
 motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other

1 words, “summary judgment should be granted where the nonmoving party fails to offer evidence from  
 2 which a reasonable [fact finder] could return a [decision] in its favor.” *Triton Energy*, 68 F.3d at 1220.

3 **B. Civil RICO claims.**

4 Under 18 U.S.C. §1962, a plaintiff must establish that the defendant in a civil RICO claim (1)  
 5 conducted 92) and enterprise (3) through a pattern (4) of racketeering activity. “Racketeering activity”  
 6 under 18 U.S.C. §1961 includes indictable offenses under a variety of federal statutes, including mail fraud  
 7 and wire fraud. To allege a violation of mail fraud it is necessary to show that (1) the defendants formed a  
 8 scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United  
 9 States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive  
 10 or defraud. *See Miller v. Yokohama Tire Corp.*, 358 F.3d 616 at 620 (9<sup>th</sup> Cir. 2004). As the defendants  
 11 correctly point out, mail fraud cannot be predicated on misrepresentations of law or misrepresentations as  
 12 to matters of law, which are matters of opinion and not actionable as fraud, even if they are false. *Miller* at  
 13 621.

14 Plaintiff claims that the defendant attorneys engaged in mail fraud and extortion when they obtained  
 15 the default judgment against him on behalf of their client, Olson Engineering. Mr. Gass’ claims relate to  
 16 the attorneys statement to the Superior Court that Mr. Gass could not be located, and therefore not  
 17 personally served, in Washington. Mr. Gass claims here, as he did in state court, that this statement was  
 18 not true, and that he in fact lived in Washington throughout the relevant time frame. He does not explain  
 19 the fact, expressly relied upon by the state court, that he gave Olson his address in California, and  
 20 maintained only a P.O. Box in Washington. He provides no additional evidence suggesting that the  
 21 defendant attorneys knew he resided in Washington and “lied” to the court with the specific intent to  
 22 deceive the court.

23 Furthermore, and in any event, these allegations were made to, and rejected by, the state trial court.  
 24 This court is in no position to re-visit on a paper record (or otherwise) the decisions of a state trial court.  
 25 The attorneys’ statement that they could not locate Mr. Gass cannot support a civil RICO claim as a matter  
 26 of law.

27 As to the newer claim that the attorneys engaged in extortion when they threatened to prolong the  
 28 litigation, Plaintiff does not squarely address the defendants’ authority which states: “[T]hreats to  
 commence or prolong litigation does not constitute extortion for purposes of Civil RICO.” [Numerous

1 citation omitted.] The remaining claims of extortion (notifying the title company of the writ of attachment  
 2 and Olson's claim against the property; "forcing" Mr. Gass to stipulate to the dismissal of Olson's claims  
 3 against him) similarly are without legal or logical support.

4 **C. Lack of Damages.**

5 An additional fatal flaw in Mr. Gass' claim is that he cannot prove that any alleged RICO violation  
 6 caused him any damage. Mr. Gass was sued by Olson Engineering for failing to pay for services allegedly  
 7 rendered. A default judgment was obtained, but vacated. The trial court issued a prejudgment "writ of  
 8 attachment" on the property, which Mr. Gass chose to pay off in order to sell the subject property.  
 9 Though he might have preferred not to, he did so "voluntarily" as he deemed that option superior to  
 10 continuing to litigate<sup>2</sup> the validity of Olson's claim and potentially losing the sale. The lawsuit was  
 11 thereafter dismissed with prejudice, as Mr. Gass concedes. Finding that he suffered damage would require  
 12 this court to adjudicate the validity of Olson's claim in a manner directly contrary to the judgment entered  
 13 in state court. Again, this is not something that this court can or will do.

14 **D. Litigation Privilege.**

15 Finally, it is clear that the statements of the defendant attorneys in state court as to their efforts and  
 16 ability to serve Mr. Gass in Washington are privileged,<sup>3</sup> and they are immune from subsequent damages  
 17 claims based on them. *See, for example, McNeal v. F.F. Allen*, 95 Wn.2d 265, 267 (1980). If and to the  
 18 extent the attorneys violated their Rule 11 obligations before Judge Nichols, the proper place for  
 19 remedying that conduct was in that proceeding – a course which Mr. Gass unsuccessfully pursued. Again,  
 20 this court is not in a position to re-visit and essentially reverse the judgment of the state trial court.

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 25 For these reasons, the Plaintiff's Motions for a Pretrial status Conference [Dkt. #13] and for  
 26 Judgment on the Pleadings [Dkt. #20] are DENIED. Defendants' Motion for Summary Judgment [Dkt.

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 28 <sup>2</sup>It should be noted that the defendant attorneys apparently offered to allow the sale if the disputed amount was withheld in escrow. Mr. Gass apparently rejected this option.

<sup>3</sup>This is true whether they were acting as attorneys or witnesses.

1 #21] is GRANTED and Plaintiff's claims against all defendants are DISMISSED with PREJUDICE.  
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DATED this 31<sup>st</sup> day of March, 2006

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RONALD B. LEIGHTON  
6 UNITED STATES DISTRICT JUDGE  
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